MOTION FILED
APR 11 1989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE AND RESPONSE OF AMICUS CURIAE COMMUNICATIONS SATELLITE CORPORATION TO RESPONDENTS' SUPPLEMENTAL MEMORANDUM

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April 11, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1249

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

No. 88-1250

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE RESPONSE OF AMICUS CURIAE COMMUNICATIONS SATELLITE CORPORATION TO RESPONDENTS' SUPPLEMENTAL MEMORANDUM

Communications Satellite Corporation ("COMSAT") respectfully moves for leave to file the attached pleading.

On April 3, 1989, COMSAT filed a brief as *amicus curiae* in support of the above-captioned petitions for writ of certiorari, and the federal government respondents filed their brief in opposition. Several days later, the federal respondents filed a supplemental memorandum responding to certain arguments made by COMSAT in its *amicus curiae* brief. That supplemental memorandum was not received by COMSAT or the petitioners until Friday, April 7th.

Upon reviewing this supplemental response, COMSAT concluded that it creates an erroneous impression about the issues raised in COMSAT's *amicus curiae* brief. The Supreme Court rules make no provision, however, for *amicus curiae* to respond to such a supplemental pleading. COMSAT asked the New England Telephone petitioners to file the attached pleading pursuant to Supreme Court Rule 22.6, but they declined to do so, although they do not oppose the filing of this pleading. Accordingly, COMSAT respectfully requests leave to file the attached response to the federal respondents' supplemental memorandum.

Respectfully submitted,

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RESPONSE OF AMICUS CURIAE COMMUNICATIONS SATELLITE CORPORATION TO RESPONDENTS' SUPPLEMENTAL MEMORANDUM

In their supplemental memorandum, the federal respondents argue that the pendency of the *COMSAT* rate

case [1] does not undermine their previous assertion that "the continuing importance of the present ruling is insufficient to warrant review" (Supp. Mem. at 2). Some of the stated assumptions upon which that argument rests are not valid.

First, while it is technically accurate to say that there is "no other outstanding decision raising the refund issue decided by the court of appeals," we pointed out in our papers that the Commission has continued to exercise its newly asserted statutory authority to require refunds even though it did not rely upon Section 204 of the Communications Act.[2]

Second, it is true that in *COMSAT*, as in the present case, the Commission imposed an accounting order. But even assuming for present purposes that the accounting order in *COMSAT* was valid,[3] it cannot properly be used in that case or in the present case to achieve the result sought by the Commission. The purpose of an accounting order under Section 204 is to enable an accounting at the end of the investigation of rates placed into effect during the investigation.[4] The salient point, however, is that the focus of the investigation is on whether the rates were excessive *when filed*. In other words, the agency is to determine whether the carrier included all of its

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[1] *Communications Satellite Corporation*, 3 FCC Rcd 2643, *appeal docketed*, No. 88-1243 (D.C. Cir. March 28, 1988).

[2] Brief of Communications Satellite Corporation as Amicus Curiae in Support of Petitioners at 4 n.5.

[3] COMSAT argued before the Commission and would press on appeal its view that, under the express terms of Section 204, an accounting order cannot be imposed when, as in the *COMSAT* case, the new tariffs reflected decreased rather than increased charges, and the new tariffs were not suspended.

[4] New England Telephone and Telegraph Company, *et al.*, Petitioners' Reply Brief at 6.

legitimate costs (and only the legitimate costs) under the rules or regulations then applicable and whether the other estimates upon which the rates were based were reasonable when made. It is quite a different matter to determine, based on subsequent developments, whether the estimates were in actuality borne out.

In the *COMSAT* case, as in the present case, the Commission did not dispute the reasonableness of the estimates upon which the filed rates were premised. Rather, it concluded after the fact that the rates were excessive because they produced earnings greater than had been reasonably estimated. That is the kind of retroactive ratemaking which the cases roundly condemn. This is why the present case clearly warrants exercise of the Court's certiorari review.

Respectfully submitted,

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